UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE M. OCHOA TAMAYO, Plaintiff, v. CAROLYN W. COLVIN, Acting Commissioner of the Social Security Administration,[1/] Defendant.	Case No. CV 12-8484 JCG **MEMORANDUM OPINION AND ORDER**

Jose M. Ochoa Tamayo ("Plaintiff") challenges the Social Security Commissioner's decision denying his application for supplemental security benefits. Three issues are presented for decision, namely (1) whether the Administrative Law Judge ("ALJ") erred in his assessment of Plaintiff's residual functional capacity ("RFC"), (*see* Joint Stip. at 3-4); (2) whether the ALJ improperly rejected Plaintiff's credibility, (*see id.* at 4-5); and (3) whether the ALJ erred in finding that work exists in the national economy that Plaintiff can perform, (*see id.* at 12-14, 17-18).

[1/] Carolyn W. Colvin is substituted as the proper defendant herein. *See* Fed. R. Civ. P. 25(d).

The Court addresses – and rejects – Plaintiff's contentions below.

A. The ALJ's Assessment of Plaintiff's RFC

First, Plaintiff contends that the ALJ erred in finding that he could "occasionally engage in fine [] manipulation" with his right arm. (Joint Stip. at 3; Administrative Record ("AR") at 20.) Specifically, Plaintiff argues that the ALJ accepted the opinions of the consultative examiner and State Agency consultants as to Plaintiff's total inability to perform fine manipulation with his right arm, but ignored them in his RFC finding. (*Id.*) Defendant responds that, even if the RFC contained an error, the vocational expert ("VE") identified a viable occupation that required *no* use of the right arm, and thus, any error was harmless. (Joint Stip. at 7.)

"A decision of the ALJ will not be reversed for errors that are harmless." *Stout v. Comm'r Soc. Sec. Admin.*, 454 F.3d 1050, 1054 (9th Cir. 2006) (*citing Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th Cir. 1990)); *Molina v. Astrue*, 674 F.3d 1104, 1117 (9th Cir. 2012) ("We have long recognized that harmless error principles apply in the Social Security Act context."). An error is harmless when it is "inconsequential to the ultimate nondisability determination." *Molina*, 674 F.3d at 1107. "[T]he burden of showing that an error is harmful normally falls upon the party attacking the agency's determination." *Id.* at 1111 (*quoting Shinseki v. Sanders*, 556 U.S. 396, 409 (2009)).

In this case, any error committed by the ALJ was harmless because it was inconsequential to the ultimate nondisability determination. *See Molina*, 674 F.3d at 1115. Indeed, in his hypothetical to the VE, the ALJ included the very omission of which Plaintiff now complains. (AR at 47.) The ALJ specifically asked the VE to determine if work exists for one who "is *precluded* from fine manipulation with the dominant hand." (*Id.*) (emphasis added). The VE identified "conveyor line bakery worker" as a feasible option and noted "that the job could be accommodated . . . that the restriction of the right [] dominant hand as an assist would not preclude that work." (*Id.*) The ALJ continued, "If the individual does not have use of the right

upper extremity even for assistance. So there's no assist from the upper right extremity. Would such an individual still be able to perform this job?" (*Id.* at 50.) The VE replied, "I believe they could. Again, it's just, it's removing something defective off a conveyor." (*Id.*) Because the VE identified a job that requires *no* use of the right arm, thereby accommodating a greater restriction than that allegedly omitted, Plaintiff has not shown that the omission affected the ultimate result in his case. As such, any error was harmless and Plaintiff's first argument fails.

B. The ALJ's Rejection of Plaintiff's Credibility

Next, Plaintiff argues that, in finding that he had the RFC to perform light work, the ALJ improperly rejected his subjective complaints. (Joint Stip. at 4.) Specifically, Plaintiff complains that the ALJ failed to consider his testimony that he could only lift ten to fifteen pounds with his left hand.[2/]

In evaluating the credibility of a claimant's testimony as to subjective pain or the intensity of symptoms, the ALJ engages in a two-step analysis:

> (1) the ALJ must first determine whether there is objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged, and (2) if the claimant has presented such evidence, and there is no evidence of malingering, then the ALJ must give specific, clear and convincing reasons to reject the claimant's testimony about the severity of the symptoms.

Molina, 674 F.3d at 1112 (citation omitted); *see Bunnell v. Sullivan*, 947 F.2d 431 (9th Cir. 1991) (summarizing legislative history, including a proposed standard permitting a finding of disability based *solely* on subjective complaints, but which

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[2/] Plaintiff also complains that the ALJ failed to consider testimony that he could only lift five pounds with his right hand. (Joint Stip. at 4; AR at 20, 41-42.) As noted above, any error in this regard was harmless because the VE identified a position that did not require any use of Plaintiff's right extremity. (*See* AR at 50.)

"has never been embraced by Congress, the Secretary or this Circuit."); *see also* 20 C.F.R. § 404.1529 ("statements about your pain or other symptoms will not alone establish that you are disabled; there must be medical signs and laboratory findings which show that you have a medical impairment(s) which could reasonably be expected to produce the pain or other symptoms alleged.").

Here, Plaintiff cannot satisfy step one of the analysis. There is no objective medical evidence of any impairment to Plaintiff's left arm. (*See* AR.) Plaintiff never alleged any injury to his left arm, nor did he seek any such treatment. (*Id.*) In fact, there is only one mention of Plaintiff's left arm in the whole of his medial records, specifically, that he has a left-arm grip strength of ninety-five pounds.[3/] (*Id.* at 274.) Because Plaintiff presented no objective evidence of an impairment, the Court need not inquire whether the ALJ gave "specific, clear and convincing reasons" for rejecting testimony as to his left arm. Plaintiff's second argument thus fails.

C. The ALJ's Finding That Work Exists in the National Economy That Plaintiff Can Perform

Finally, Plaintiff contends that the ALJ erred in finding that work exists in the national economy that he can perform. (Joint Stip. at 3.) Specifically, Plaintiff argues that because the VE identified only one viable occupation, the ALJ's decision lacks substantial evidence. (*Id.* at 12-14.)

The ALJ has the burden of proving that work exists in the national economy that a claimant can perform. *Johnson v. Shalala*, 60 F.3d 1428, 1432 (9th Cir. 1995). "Work exists in the national economy when there are a significant number of jobs (*in one or more occupations*) having requirements which you are able to meet with your physical or mental abilities and vocational qualifications." 20 C.F.R. §

[3/] One page of a medical record from UCLA Medical Center lists the laceration and surgical scars as being on Plaintiff's left arm. (AR at 225.) The Court finds this to be a mere typographical error.

404.1566(b) (emphasis added). "[O]ne job within the [relevant] category is sufficient, as long as the one occupation still has a significant number of positions that exist in the national economy. *Udell v. Colvin*, 2013 WL 4046465, at *7 (S.D. Cal. Aug. 8, 2013); *see, e.g.*, *Tommasetti v. Astrue*, 533 F.3d 1035, 1044 (9th Cir. 2008); *see also Gaspard v. Comm'r Soc. Sec. Admin.*, 609 F. Supp. 2d 607, 613-14 (E.D. Tex. 2009) (*citing Evans v. Chater*, 55 F.3d 530, 532-33 (10th Cir. 1995)) ("The Commissioner's burden . . . is satisfied by showing the existence of only one job with a significant number of available positions that the claimant can perform.").[4/]

Even in the face of the plain language of the statute, Plaintiff maintains that substantial evidence can never support a nondisability finding based on one job alone. (Joint Stip. at 3.) Plaintiff roots his argument in the holding of *Lounsburry v. Barnhard*, 468 F.3d 1111 (9th Cir.) *as amended* (2006). However, his reliance is misplaced, as *Lounsburry* is easily distinguishable from the case at bar.

In *Lounsburry*, the claimant was of advanced age (62), *see* 20 C.F.R. § 404.1563(e), retained transferrable skills from her previous employment, and was capable of light work. *Id.*; *see* 20 C.F.R. § 404, Subpt. P, App. 2. The ALJ found the claimant to be capable of one occupation and concluded that she was not disabled. *Lounsburry*, 468 F.3d at 1113.

On appeal, the Ninth Circuit held that the ALJ erred by not applying Rule 202.00(c). *Id.* at 1116; *see* 20 C.F.R. § 404, Subpt. P, App. 2. Rule 202.00(c) provides that "for individuals of advanced age who can no longer perform vocationally relevant past work and . . . who have only skills that are not readily

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[4/] Plaintiff does not argue that 97,000 local and 300,000 regional conveyor line positions are not "sufficiently significant." While the Ninth Circuit has not set out a bright-line rule for what constitutes a 'significant number' of jobs, courts have accepted *far* fewer than the number in this case. *See Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012) (compiling cases).

transferable to a *significant range* of semi-skilled or skilled work that is within the individual's functional capacity . . . the limitations in vocational adaptability represented by functional restriction to light work warrant a finding of disabled." *Lounsburry*, 468 F.3d at 1116 (emphasis added); *see* 20 C.F.R. § 404, Subpt. P, App. 2. The Court held that one job does not satisfy the statute's "significant range" requirement, and the claimant was, in fact, disabled. *Lounsburry* 468 F.3d at 1116.

Plaintiff argues that the "significant range" requirement applies to his case. (Joint Stip. at 3.) However, he ignores the plain language of the rule. Rule 202.00(c) speaks only to individuals of advanced age, who retain transferable skills, and are capable of light work. *See* 20 C.F.R. § 404, Subpt. P, App. 2. The rule does not apply where, as here, Plaintiff is a younger person, with no transferable skills,[5/] and is capable of light work. (*See* AR at 23.)

The facts and holding of *Tommasetti v. Astrue*, 533 F.3d 1035 (9th Cir. 2008) are instructive on this point. In *Tommasetti*, the claimant was of advanced age, retained transferrable skills, and was capable of sedentary work. *Id.* at 1043. The ALJ found him nondisabled based on his ability to perform one job. *Id.* On appeal, the claimant argued that the "significant range" requirement applied to his case. *Id.* The Ninth Circuit disagreed and "rejected the claimant's attempt to graft rules applicable to the light exertion grid onto the sedentary exertion grid." *Id.* at 1044. Here too, the Court rejects Plaintiff's attempt to apply rules for individuals of advanced age with transferable skills to younger individuals with no transferable skills.

Based on the plain language of both the statute (20 C.F.R. § 404.1566(b)) and Rule 202.00(c), because Plaintiff is capable of performing one job, substantial

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[5/] In his decision, the ALJ said that it was irrelevant whether Plaintiff had any transferrable skills because he would be found nondisabled either way. (AR at 23.) However, in his hypothetical to the VE at Plaintiff's hearing, the ALJ stated that Plaintiff had no transferrable skills. (*Id.* at 44.)

evidence supports the ALJ's nondisability determination. As such, Plaintiff's third argument fails.

Based on the foregoing, IT IS ORDERED THAT judgment shall be entered **AFFIRMING** the decision of the Commissioner denying benefits.

Dated: October 11 , 2013

Hon. Jay C. Gandhi
United States Magistrate Judge